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Supreme Court of the United States

OCTOBER TERM, 1940

No. 445

CITY OF VERO BEACH, a Municipal Corporation organized and existing under the laws of the State of Florida, *Petitioner*,

vs.

THE RITTENOURE INVESTMENT COMPANY, a Corporation organized and existing under the laws of the State of Kansas, *Respondent*.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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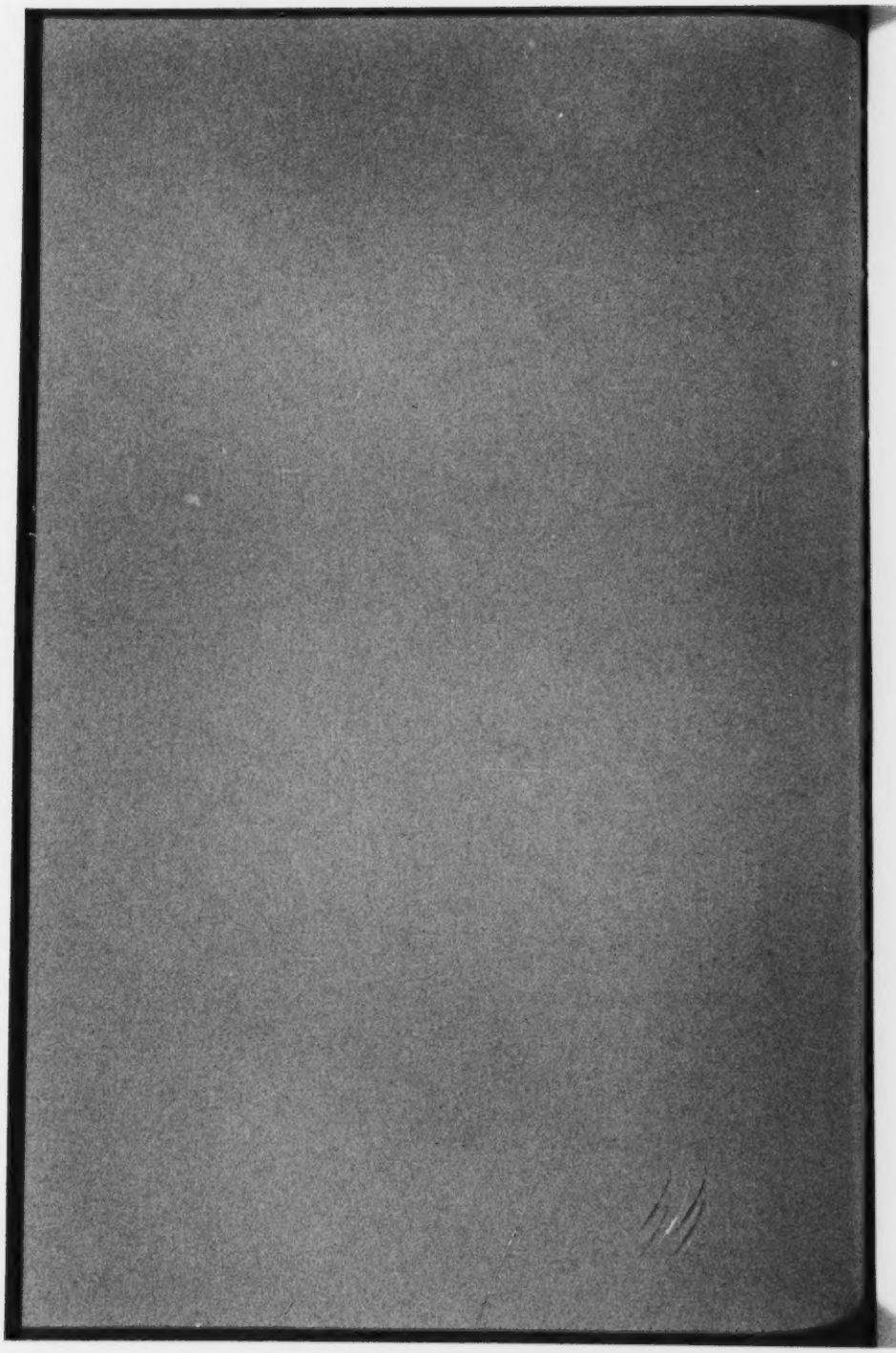

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STATEMENT OF THE CASE.

This is an action for damages for the alleged breach of a written contract to "work out * * * a refunding of * * * (the) outstanding debt" of the City of Vero Beach, Florida, amounting to approximately $1,500,000.00. The written offer which is alleged to have been accepted by the petitioner provides as follows:

> "Hon. Mayor and City Council of the
> City of Vero Beach, Florida.
>
> "Gentlemen:
>
> "The undersigned proposes to work out for the City of Vero Beach, Florida as its fiscal agent and

representative, a refinancing and refunding of its outstanding debt, to include all bonds and time warrants of said city, and all judgments and indebtedness for which tax levies have been ordered to be made pursuant to writs of mandamus, all of which totals approximately the sum of $1,500,000.00 All of said obligations will be refunded by exchanging the said obligations par for par of principal for refunding bonds of the City of Vero Beach, Florida, to be general obligations of said city and an unlimited ad valorem tax pledged to the payment thereof for both principal and interest; all maturing and to become due forty years from the date of issuance and to bear interest at the rate of one per cent per annum for the first five years, two per cent per annum for the next five years, three per cent per annum for the next ten years, four per cent per annum for the next ten years and five per cent per annum for the next ten years; said bonds to be exchanged for refunding bonds to have intact all interest coupons not matured as of date of exchange.

"We agree to effect the exchange of said refunding bonds and have the said refunding bonds printed, duly validated and to bear all cost of same, for which at the time of exchange the City of Vero Beach is to pay us $2.50 per thousand so exchanged.

"We are also to receive from the holders thereof all delinquent coupons from City of Vero Beach bonds and time warrants as of date of exchange, out of which we are to receive as compensation for our services in connection herewith the sum of $25.00 per thousand of bonds exchanged, the same to be paid in cash out of the sale of said delinquent interest coupons, and all overplus from said delinquent coupons we agree to pay over to the City of Vero Beach, to be placed in the sinking fund account of said bonds, and also to place said coupons for sale to the taxpayers of said city for their use in the payment of delinquent taxes and/or assess-

ments against property therein at and for the sum of 12½ cents on the dollar for a period of one year from the time the refunding under this agreement is finally consummated and 15 cents on the dollar for a period of one year thereafter.

"The City Council of the City of Vero Beach will cause a sinking fund to be created for the retirement of the principal of said bonds at maturity, consisting of any and all cash settlements of delinquent taxes as of January 1, 1935, and improvement assessments and the sale of any real estate owned by said City in what is known as McAnsh Park Subdivision, and also beginning with the eleventh year of said refunding issue will levy each year thereafter a tax calculated to produce together with the other items in the sinking fund, a sum sufficient to retire said bonds at maturity thereof. Retirement of said bonds as to principal to be by redemption in numerical order and/or by purchase at the lowest market price available at any time, and the funds in the sinking fund account to be used for either purpose.

"It is understood and agreed that the City of Vero Beach by virtue of this proposition does not and will not incur in any manner any obligation other than that expressly stipulated herein and that no act of the undersigned will in any manner bind or obligate said City, except in strict accordance with the provisions of said writing.

"The undersigned agrees that it will have in its hands for refunding 75 per cent of each class of the indebtedness of said city to be refunded hereunder by October 1, 1935, and that should it fail to so do that this agreement will then terminate and be at an end and the City's liability cease thereunder, but that if said 75 per cent of each class of the indebtedness so to be refunded shall have been obtained by the undersigned on or before October 1, 1935, then said agreement shall continue until the entire in-

debtedness shall have been refunded in accordance herewith.

THE RITTENOURE INVESTMENT COMPANY.
By (Signed) L. RITTENOURE.

"Pursuant to motion duly adopted by the City Council of the City of Vero Beach, Florida, said City by and through its undersigned officers duly authorized to execute this agreement, does hereby accept the within and foregoing proposition on behalf of said city, this 18th day of January, 1935.

CITY OF VERO BEACH,
By (Signed) ALEX MACWILLIAMS,
Mayor.

Attest: A. C. MACDONNELL, *City Clerk.*

(Extended to April 1, 1936, Resolution City Council, February 26, 1935.)" (R. 8-10)

The third amended petition alleges that the foregoing proposal is one for the refunding of the entire outstanding indebtedness of the city; that defendant breached the contract by its failure to effect the exchange of refunding bonds or to have seventy-five per cent of each class of said outstanding indebtedness to be refunded in defendant's hands by April 1, 1936, or any other date; that if defendant had had seventy-five per cent of the outstanding indebtedness in its hands on October 1, 1935, or April 1, 1936, a refunding to that extent could have been effected on said date; and that as a result of defendant's failure plaintiff continues to be obligated to pay the original rate of interest upon its indebtedness from October 1, 1935 to January 1, 1938, instead of two per cent. (R. 12) The prayer is for judgment for $115,000.00 and interest. (R. 13.)

The district court sustained the defendant's motion to dismiss upon the ground that the petition failed to state a cause of action and granted leave to amend. Plaintiff elected to stand upon its third amended petition and the action was dismissed by the court with prejudice. (R. 18.) The judgment of the district court was affirmed by the Circuit Court of Appeals for the Tenth Circuit upon the ground that the contract sued upon could not be enforced against the plaintiff municipality under Florida law as stated in the decision of the Supreme Court of Florida in the case of *Taylor v. Williams,* ———Fla———, 195 So. 175, and that the contract was therefore unenforceable for want of mutuality. (R. 25-29)

ARGUMENT AND AUTHORITIES.

The reasons for the allowance of the writ, as stated in the petition, are the following:

> "1. That the Circuit Court of Appeals decided an important question of local law in a way in conflict with applicable local decisions in its holding that the fiscal agency contract involved is void.
>
> "2. That the Circuit Court of Appeals of the Tenth Circuit has rendered a decision in conflict with the decisions of the Circuit Court of Appeals of the Fifth Circuit on the question of the validity of fiscal agency contracts of the nature involved.
>
> "3. That there is now pending in this Court upon writ of certiorari having been granted, the case of *American United Mutual Life Insurance Co. v. City of Avon Park, Florida,* No. 31, October Term, 1940, in which is directly involved the question of the validity under Florida law of a fiscal agency contract virtually identical with the one involved in the suit at bar; and if held valid

under local law in the Avon Park case, the decision of the Circuit Court of Appeals of the Tenth Circuit in the suit at bar should be reversed; however, a failure to award a writ of certiorari will result in Petitioner being denied a right of review in such event."

The reasons will be considered in order.

I.

CIRCUIT COURT OF APPEALS CORRECTLY APPLIED APPLICABLE FLORIDA LAW.

The Florida decision relied upon and applied by the Circuit Court of Appeals is *Taylor v. Williams,* —Fla. —, 195 So. 175. In that case the Florida Supreme Court had before it a refunding contract substantially identical with the contract upon which the present action is based. It was held that the contract was unenforceable and that a levy of taxes for the payment of principal and interest upon bonds issued pursuant to such a contract might be enjoined at the suit of a taxpayer. The pertinent portion of the opinion reads as follows:

"Appellant's question No. XI:

"'Is the new 2 per cent refunding agreement dated August 7, 1939, complained of in the Taylor bill (Taylor Record, page 43), void, and should its performance have been enjoined?'

"In the issuing of bonds to be paid by taxation, the official duties of the county commissioners include the administrative function of providing directly for the printing, approval and other legal or fiscal matters, not including mere technical or ministerial services which may be performed by employees. As shown by the resolutions adopted

August 7, 1939, by the county commissioners, the contract of August 7, 1939, states that R. E. Crummer & Company, 'first party', is 'a Delaware Corporation', and the county commissioners, 'second party'. As stated in the agreement of August 6, 1935, R. E. Crummer & Company 'represents the holders of a substantial portion of the outstanding bonds of Lake county.' The law does not contemplate or permit the appointment of a foreign corporation representing 'the holders of a substantial portion of the outstanding bonds' as fiscal agent for the county or districts in managing or controlling any of the official functions involved in the issuing of refunding bonds. The contract of August 7, 1939, provides:

> " 'That first party (R. E. Crummer & Company) shall defray all expenses incident to: (a) assembling and exchanging the bonds herein proposed to be refunded; (b) printing the said refunding bonds; (c) the representation of Second party (the county commissioner) in legal proceedings to validate said refunding bonds; (d) obtaining the approving opinion of nationally recognized bond counsel upon the procedure used for the issuance and validation of said Refunding Bonds, said counsel to be selected by First party; (e) all other expenses in connection herewith which may be approved by First Party.'

"Nor does the law permit the payment of money from the sinking funds of the county or districts as fees for a refunding agent. *Pierce v. Isaac,* 135 Fla. 101, 184 So. 669. When such an agent may legally be employed for services in no wise official in their nature, proper compensation for such service may be provided for as the law authorizes.

"The refunding resolutions and contracts are not in accord with law, and the bill of complaint should

not have been dismissed. This is a taxpayer's suit and not a bond validating proceeding."

Petitioner seeks to avoid the effect of this decision in several ways, the first of which is a contention that the opinion of the Florida Supreme Court denying a rehearing in the Taylor case indicates that the only matter involved in the original opinion was a provision of the agency contract providing for the payment of refunding fees out of sinking fund moneys and that the court did not intend to hold the refunding contract unenforceable. The opinions denying a rehearing and refusing a modification are not subject to such a construction.

In the first of these opinions, reported in ——Fla——, 195 So. 184, a majority of the court concurred in denying a rehearing and in refusing any modification of the opinion whatsoever. Two justices joined in a specially concurring opinion in which they dissented from the views of a majority of the court and adopted the view that the original opinion should be modified by deleting the portion of the original opinion in which it was held that the agency refunding contract was invalid.

In a later opinion reported in ——Fla.——, 196 So. 214, a majority of the court again denied a rehearing and again refused to modify the portion of the original opinion in which the agency refunding contract was held invalid. Mr. Justice Buford dissented. Mr. Justice Brown wrote a concurring opinion reading as follows:

"The conclusions reached in the foregoing opinion are fully justified by this Court's previous opinions and decisions in *Taylor v. Williams,* 195 So. 175, and *W. J. Howey Co. v. Williams,* 195 So. 181, which were handed down by a unanimous Court; also by the opinion rendered in both of these cases

on petitions for rehearing, see 195 So. 184, wherein Mr. Justice Buford and the writer dissented in part from the views of the four members constituting the majority, but otherwise concurred, Mr. Justice Buford's opinion being filed as a special concurring opinion. Therefore, the questions attempted to be raised by the additional motions filed herein have been heretofore settled after full briefing and argument and careful consideration by the members of the Court, and I therefore concur in the conclusions reached in the foregoing opinion, as well as in the order denying said motions."

The construction of the original opinion in the Taylor case for which petitioner contends is a construction which was urged by two dissenting justices and rejected by a majority of the court. The court twice refused to modify in any way its original opinion that the agency contract was invalid.

On page 8 of its brief petitioner states, "Evidently the Circuit Court of Appeals did not have before it the later opinions and modifications in the Taylor litigation." The present case was submitted to the Circuit Court of Appeals at its January, 1940, term. (R. 29.) The decision in *Taylor v. Williams,* supra, decided February 23, 1940, was called to the court's attention on March 15, 1940, some time after submission of the case. No opinion was handed down until June 27, 1940. (R. 29, 30.) The first opinion of the Florida Supreme Court denying a rehearing or modification was handed down on April 2, 1940. (*Taylor v. Williams,* ——Fla. ——, 195 So. 184.) The second opinion denying a rehearing or modification was handed down May 17, 1940. (*Taylor v. Williams,* ——Fla——, 196 So. 214.) The opinion in the present case was not filed until six

weeks after the last opinion denying rehearing. We believe that it may safely be assumed that the Circuit Court of Appeals waited until the disposition of the pending petitions for rehearing before deciding the case and that it was fully cognizant of the terms of both opinions refusing to rehear the Taylor case or to modify the original opinion. In any event both opinions were called to the attention of the Circuit Court of Appeals in petitioner's petition for rehearing. (R. 36.)

Petitioner next seeks to distinguish the Taylor case by an argument that the decision applies only to agency refunding contracts entered into by counties and boards of public instruction and has no application to municipalities. The refunding which was to be attempted under the contract sued upon in the present case was to be attempted pursuant to the General Refunding Act of 1931. (Chapter 15,772, Laws of Florida, Acts of 1931.) No other statute authorized a refunding by the petitioner of an indebtedness in excess of $1,000,000.00. The indebtedness to be refunded amounted to approximately $1,500,000.00. (R. 6, 7, 8-10.) The refunding undertaken in *Taylor v. Williams,* supra, was pursuant to exactly the same statute. That statute by its express terms applies alike to counties, cities, towns, school districts and all other taxing districts.

Section 2 of the act provides:

> "Each county, city, town, special road and bridge district, special tax school district, and other taxing districts in this State, herein sometimes called a unit, is hereby authorized to issue, pursuant to a resolution or resolutions of the governing body thereof (meaning thereby the board or body vested with the power of determining the amount of tax levies required for taxing the taxable property of

such unit for the purpose of such unit) and either with or without the approval of such bonds at an election, except as may be required by the Constitution of the State, bonds of such unit for the purpose of refunding any or all bonds, coupons, or interest on any such bonds, or coupons or paving certificates of indebtedness or interest on any such paving certificates of indebtedness, now or hereafter outstanding, or any other funded debt, all of which are herein referred to as bonds, whether such unit created such indebtedness or has assumed or may become liable therefor, and whether indebtedness to be refunded has matured or to thereafter become matured."

Section 31 of the act provides:

"This Act shall be deemed to apply to taxing districts of every character and description provided for under the general or special laws of this State, whether consisting of portions of a county or of territory located in more than one county, provided, however, the provisions of this Act shall not apply to any drainage district where there is pending at this time a suit contesting either the validity of the bonds issued by such district, or the assessment levied or any suit involving directly or indirectly the validity of such Drainage District or the validity of the bonds issued by such District or the validity of the assessment levied in such District."

By the provisions of section 2 of the General Refunding Act of 1931 (Chapter 15772, Laws of Florida, Acts of 1931) the refunding was to be undertaken by the "governing body" of the taxing unit. The governing body was defined as the board or body vested with the power of determining the tax levy. In the case of a county that board is the board of county commissioners. In the

case of the petitioner that body was its city council. (Sec. 59, Chap. 14,439, Laws of Florida, Special Acts of 1929.) The refunding in both the Taylor case and in the present case were to be undertaken under the same law. In the Taylor case the court held that in the issuing of bonds to be paid by taxation the official duties of the governing body (county commissioners) "include the administrative function of providing directly for the printing, approval, and other legal or fiscal matters" and that the law does not contemplate or permit the appointment of a corporation representing bondholders "as fiscal agent for the county or districts in managing or controlling any of the official functions involved in the issuing of refunding bonds." If the governing body of a county cannot delegate to a corporate fiscal agent its duties relative to the issuing of refunding bonds no reason is discernible why the governing body of a city having exactly the same duties could delegate those duties to a corporate fiscal agent representing a substantial number of bondholders.

Petitioner cites section 32 of the petitioner's charter act (Chapter 14439, Laws of Florida, Special Acts of 1929) which reads as follows:

> "The City Council shall have the power and is hereby authorized to create by ordinance such additional officers or employees as it may in its judgment deem necessary. *The Council shall have power at any time by ordinance to abolish any offices thus created.*"

The italicized concluding sentence of this section is omitted from petitioner's quotation. (Brief p. 10.) This sentence indicates very clearly that the officers and employees referred to are employees whose duties are pure-

ly ministerial. In the Taylor case it was held that the duties alleged to have been undertaken by respondent as fiscal agent were not ministerial but were such as were placed upon the governing body by the General Refunding Act. Even if respondent were such an employee as contemplated in section 32 of the Charter Act, the contract sued upon is clearly unenforceable. The contract between petitioner and respondent (as extended) allowed respondent a period of nearly fifteen months to get seventy-five per cent of the outstanding indebtedness in its hands available for refunding. (R. 9, 10.) Under the contract respondent was petitioner's fiscal agent during that period. (R. 8-10.) The governing body of petitioner could not by contract forego the authority granted it by statute "at any time by ordinance to abolish any offices thus created."

On page 10 of its brief petitioner cites *Pierce v. Isaac,* 134 Fla. 666, 184 So. 509. As the court specifically pointed out in its second opinion denying a rehearing or modification of the opinion in the Taylor case, (——Fla.——, 196 So. 214, l. c. p. 217) the contentions raised in the Taylor case as to the invalidity of the agency contract between Lake County and R. E. Crummer & Company were not decided in *Pierce v. Isaac.*

On page 11 of its brief petitioner argues that the contract involved in the present case did not provide for the payment of fees out of the sinking fund nor did it delegate any official function to the fiscal agent. As stated in the opinion of the Circuit Court of Appeals, "In *Taylor v. Williams,* ——Fla.——, 195 So. 175, decided February 23, 1940, the Supreme Court of Florida had before it for consideration a contract substantially the same as the one we have here." (R. 28.) In the pres-

ent case, contrary to petitioner's statement, the contract provides that respondent's compensation for effecting a refunding of petitioner's indebtedness was to come out of the sinking fund. The contract provided that respondent was to receive all delinquent coupons on petitioner's outstanding indebtedness, sell the coupons, retain out of the proceeds the sum of $25 per thousand dollars of bonds refunded and pay the remainder of the proceeds into the sinking fund. (R. 8.) If this arrangement was not one for the payment out of the sinking fund of respondent's fees for effecting the refunding, we are greatly mistaken. As in the Taylor case the present contract provided that respondent should act as "fiscal agent and representative" of the petitioner in attempting to refund its indebtedness. If successful in that undertaking respondent contracted as follows:

> "We agree to effect the exchange of said refunding bonds and have the said refunding bonds printed, duly validated and to bear all cost of same, for which at the time of exchange the City of Vero Beach is to pay $2.50 per thousand so exchanged." (R. 8.)

The contract held invalid in the Taylor case provided:

> "That first party (R. E. Crummer & Company) shall defray all expenses incident to: (a) assembling and exchanging the bonds herein proposed to be refunded; (b) printing the said refunding bonds; (c) the representation of Second party (the county commissioners) in legal proceedings to validate said refunding bonds; (d) obtaining the approving opinion of nationally recognized bond counsel upon the procedure used for the issuance and validation of said Refunding Bonds, said counsel to be selected by First party; (e) all other expenses in connec-

tion herewith which may be approved by First Party." (Taylor v. Williams, ——Fla.——, 195 So. 175, l. c. page 180.)

Both in the Taylor case and in the case at bar the contract provided that the "fiscal agent" was to have the bonds validated. The validation of bonds issued by Florida taxing districts is accomplished by a judgment rendered by the circuit court of the county in which the proceedings for the issuance of the bonds have taken place. By the Florida statutes such a judgment is authorized in an action brought by the taxing unit issuing the bonds against the State of Florida. (Comp. Laws of Florida, 1927, secs. 5106-5129.) Both in the Taylor case and in the case at bar the corporate "fiscal agent" contracted to represent the taxing district in legal proceedings in the courts of Florida.

While the opinions of both the Florida Supreme Court in the Taylor case and the Circuit Court of Appeals in the present case mention the fact that the "fiscal agent" is a foreign corporation, there is nothing in either opinion to indicate that the decision would have been different if the "fiscal agent" had been a domestic corporation.

II.

DECISION IS NOT IN CONFLICT WITH DECISIONS OF CIRCUIT COURT OF APPEALS FOR FIFTH CIRCUIT.

Petitioner's second ground for the granting of a writ of certiorari is that the decision of the lower court is in conflict with the decisions of the Circuit Court of Appeals for the Fifth Circuit in the cases of *Vallette v. City of Vero Beach,* 5 Cir., 104 F. 2d 59, and *American United Mutual Life Insurance Co. v. City of Avon*

Park, 5 Cir., 108 F. 2d 1010. The opinion in the latter case consists only of a statement that the case is governed by the Vallette case. The most careful examination of the Vallette case fails to disclose that any contention was made that the contract between the City of Vero Beach and R. E. Crummer & Company, under which a refunding was effected, was invalid for any of the reasons found to exist in *Taylor v. Williams,* supra, or in the opinion of the court below in the present case. The Vallette case was a muncipal bankruptcy case in which a plan of refunding was approved. The contention in the Circuit Court of Appeals was that the refunding plan was unfair and should not have been approved. No contention was made that the city was not unauthorized by Florida law to employ a fiscal agent for the refunding of its indebtedness, nor was any contention made that the contract between the city and the fiscal agent provided for an illegal delegation of the statutory duties of the city council, nor that the contract provided for the illegal practice of law by the corporate fiscal agent.

If it be assumed, however, that a conflict existed between the decisions of the Circuit Court of Appeals for the Fifth Circuit and the decision of the Circuit Court of Appeals for the Tenth Circuit in the case at bar, that fact would not entitle petitioner to the writ which he seeks. The difference between the two circuits, if one existed, would result from differences in applicable local law and would not be grounds for certiorari. (*Ruhlin v. New York Life Insurance Company,* 304 U. S. 202, 82 L. Ed. 1290, 58 S. Ct. 860.)

The Vallette case was decided May 22, 1939. The Avon Park case was decided January 31, 1940. The

case of *Taylor v. Williams,* supra, was not decided until February 23, 1940, subsequent to the decisions in both of the fifth circuit cases. The lower court was bound by the decision of the Florida Supreme Court in *Taylor v. Williams,* as an authoritative statement of applicable local law. If any conflict exists between the decision in the present case and the decisions of the Circuit Court of Appeals for the Fifth Circuit that conflict results solely from the fact that subsequent to the fifth circuit decisions a contrary interpretation of Florida law was made by the Supreme Court of Florida. A conflict between circuits for such a reason is not ground for certiorari.

III.

PENDENCY OF AVON PARK CASE IN THIS COURT IS NOT GROUND FOR ALLOWANCE OF WRIT IN PRESENT CASE.

Petitioner's third ground for the allowance of the writ is that this court granted a writ in *American United Mutual Life Insurance Co. v. Avon Park,* supra, that the questions involved are similar and that certiorari should be granted in the present case so that petitioner may have the benefit of a decision adverse to the petitioner in the Avon Park case should such a decision be handed down. We have not seen the record nor the petition for writ of certiorari in the Avon Park case and do not know what factors motivated the court in allowing the writ in that case. We do know that the time for filing a petition for rehearing in the Avon Park case had expired before the Supreme Court of Florida rendered its opinion in *Taylor v. Williams,* supra. We assume that the court granted the writ to enable itself to correct any injustice resulting from the fact that the

Avon Park case was decided prior to the decision in *Taylor v. Williams,* if the court should hold that case to be applicable in the Avon Park case. In the present case, however, it is apparent from the record that the decision in *Taylor v. Williams* is applicable to the case at bar, that it was binding upon the lower court and that the lower court correctly applied the rule of that case to the case at bar.

CONCLUSION.

We respectfully submit that the petition for a writ of certiorari should be denied.

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